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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON D B A CRYSTAL BALLROOM,

Petitioners,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

Respondent,

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD,

Interveners, Respondents.

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LARRY V. GEER AND MARGARET GEER, D B A LARRY GEER BALLROOMS,

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Respondent

BRIEF OF INTERVENERS, RESPONDENTS

JOSEPH A. PADWAY,
ROBERT A. WILSON,
736 Bowen Building,
Washington 5, D. C.
SHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa,
Attorneys for Interveners, Respondents.

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BRIEF OF INTERVENERS, RESPONDENTS

THE OPINION BELOW

The opinion of the District Court (R. 654-664) is reported in 59 F. Supp. 84. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 682-709) is reported in 157 F. 2d 295.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered September 25, 1946 (R. 709-711). The petition for writs of certiorari was filed on the 29th day of November, 1946 and was granted January 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347 (a).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, *infra* pg. 66.

STATEMENT OF THE CASE

Interveners Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, the six orchestra leaders named in the complaint, filed by the petitioner in the case of *Bartels, et al.* v. *Birmingham, Collector* (R. 2, 4), severally petitioned and were granted leave to intervene in that proceedings (R. 20-36). The basis for the intervention of Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead was that the employment status of each of these interveners in his individual employment relationship with petitioner Bartels, *et al.*, was put in issue in this case and concededly if petitioner should prevail interveners would each be liable for a portion of the taxes paid by petitioner on the particular engagements involved (R. 20, 22, 25, 27, 30, 33).[1]

The petitioner brought this action to recover $20.98 paid by him under the Social Security Act (Section 1426, Inter-

[1] While the case of *Bartels, et al.*, v. *Collector of Internal Revenue* was consolidated for trial with the case of *Geer, et al.* v. *Collector*, interveners are interested only in their individual cases. This brief, therefore, is concerned only with the employment status of interveners in their respective relationships with petitioner Bartels, *et al.*

nal Revenue Code as amended by Sec. 606 of Social Security Act Amendments of 1939, Chapter 666 (53 Stat. 1360; 26 U. S. C. 1426) on the wages of musicians, members of dance orchestras engaged by petitioner in the furtherance of his business. The basis of the action was that the leaders of the musicians engaged by petitioner were the employers of the musicians rather than petitioner, and that petitioner, therefore, was assessed wrongfully for these taxes by the Collector of Internal Revenue (R. 1-18).

The material facts of the case simply stated are as follows: Petitioner operates a ballroom in which dances are given for the public (R. 50). Persons are charged an admission fee to attend these dances, and as an integral part of this business, petitioner engages musicians to furnish dance music and entertainment for the patrons of the ballroom (R. 50-51). The musicians who were hired by petitioner for the musical engagements involved herein, were members of organized orchestras under the direction of leaders and the orchestras were identified by the names of the various leaders (R. 51). All of the members of the orchestras involved in this case, including the leaders, were members of the American Federation of Musicians, a labor organization composed of musicians (R. 653).

In June of 1941, the American Federation of Musicians adopted and incorporated in its by-laws a form of contract known as the Form B contract, and all members of the American Federation of Musicians were ordered by the President of the American Federation of Musicians to play all engagements entered into after June of 1941 pursuant to the terms and conditions of the Form B contract and none other (R. 500-504). (Full contract set forth on R. 87-89).

A Form B contract was entered into by petitioner for each engagement of a dance orchestra involved in this case (R. 83, 87, 91, 93, 95, 401).

The Form B contracts entered into by petitioner for the services of the musicians provided, among other things, that the petitioner hire the musicians in the orchestra severally; that the petitioner was to be the employer of the musicians; and that the petitioner was to have the full right of control of the musicians in the performance of their services for the petitioner.

SUMMARY OF ARGUMENT

I. The basic question in this case is whether interveners could contract to perform their services as the employees of petitioner or whether they, against their will, were required by law to perform their services only as independent contractors.

Petitioner desired to employ the interveners in the furtherance of his business. Interveners advised petitioner that they would work for him only if he would agree to employ them as his employees and only if he would assume the right of control over their work. In order that there could be no mistake concerning their intentions to work only as employees, interveners required that the contract of hire expressly spell out an employer-employee relationship and expressly vest in petitioner the right of control over the services to be performed. Petitioner, in order to obtain the services of interveners, entered into this employment contract and expressly agreed to assume the status of an employer and to accept the right of control over interveners' services.

The District Court held that this contract of employment, expressly spelling out an employer-employee relationship and expressly vesting the right of control in the petitioner, did not create an employer-employee relationship and disregarded the contract in determining the relationship of the parties on the ground that petitioner did not actually exer-

cise control over interveners and because of certain other extrinsic factors concerning the manner in which the orchestras had been formed and were operated. This was the equivalent of saying that interveners could not, as a matter of law, create an employer-employee relationship so long as petitioner would not actually exercise control over the work and so long as the orchestras remained organized groups and did not change their manner of operations.

The Circuit Court of Appeals, without substituting findings of fact for those of the District Court, held that the interveners and petitioner could and did establish employer-employee relationships by their express contracts and in the absence of evidence showing an abrogation of those contracts, or an implied substitution of different contracts by acts and conduct inconsistent with the relationship established therein, the contracts must be held conclusive in determining the status of the parties. None of the evidence in the record tended to establish any conduct inconsistent with the employer-employee relationship which the parties had created by their contracts of hire and, therefore, under the terms of these contracts the employer-employee relationships existed.

The error in the District Court's reasoning that the contracts of hire could and should be disregarded in determining the status of the parties is immediately apparent if we would assume, for the purpose of illustration, that the *petitioner* had been the party requiring that the work be performed under his direction and control. The same contract could be used, the same facts could exist. Petitioner certainly could not then contend he was not the employer as he is doing in the instant case. Yet, the only distinction between that case and the instant case would be that the *petitioner* required the services to be performed under an employer-employee relationship rather than interveners.

Thus the contracts of employment involved in the instant case must be held to have created the intended relationship in the absence of evidence establishing an abandonment of the contracts. If this were not so, an employer expressly retaining to himself the right to control others in the performance of work could escape his employer liabilities in each instance in which it was not necessary for him to actually exercise the control he retained for himself in his contract of employment.

II. This Court has held that common law concepts are not applicable in determining employer liabilities and responsibilities under statutes concerned with employment relations, but that employment status should be determined in the light of the purpose of the statute.

The purpose of the Social Security Act is to provide for unemployment compensation and old age assistance for those who in some way promote the business of others in the performance of their services.

Intervenors performed services for petitioner in the furtherance of petitioner's business. Petitioner sought business profits through the services of interveners whom he engaged. He, therefore, should be liable for the employer social security tax on the compensation paid to intervenors and the other members of the orchestras hired by petitioner in his business.

ARGUMENT

I. The History of the Form B Contract

The issue in this case, insofar as interveners-respondents are concerned, goes far beyond and far deeper than the question of liability for the $20.98 prayed for by petitioner in his complaint. The real issue to interveners, at least,

is whether they, in the performance of their work of leading orchestras, can render their services as employees of those who would engage them, or whether they are bound in law to accept employment only in the status of independent contractors.

As employees, leaders would be entitled to the benefits of old age insurance, unemployment compensation and to the benefits provided under the workmen's compensation laws of the various states, as well as all of the other highly desirable benefits and protections provided in law for employees. As independent contractors, not only would they lose these benefits, but in many instances the sidemen[2] in the orchestras they lead would not enjoy these benefits because of an insufficient number to meet the requirements of the various laws. For example, many state laws do not extend unemployment compensation coverage in instances where eight or fewer employees are involved, and in many states workmen's compensation does not extend to small groups of employees. Therefore sidemen in small orchestras would lose benefits in many instances if they are the employees of the leaders, while as employees of the person engaging the orchestra, they, together with the leader would be merged in with the other employees of that person in computing the number of employees.

While the enactment of the Social Security Act gave added importance to the question of the relationship of an orchestra leader and members of an orchestra to the person or establishment engaging the orchestra, many cases involving this question arose prior to the enactment of the Social Security Act, with the musicians, including the

[2] Sidemen is a term which designates the instrumentalists in an orchestra as distinguished from the leader.

leaders, contending successfully that they were employees of the persons engaging the services of the orchestras.[3]

When the Social Security Act became law, professional musicians[4] throughout the country, in order to obtain the full benefits of that law, took the position through their labor union, the American Federation of Musicians, that they were employees of those engaging their services, were entitled to the benefits of the Act and were liable for the employees' share of taxes or contributions. At that time the Bureau of Internal Revenue issued a ruling supporting

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[3] In the following cases the purchaser of the music was held to have been the employer of the musicians, including the leader, he had engaged in the furtherance of his business:

Cases involving claims for Workmen's Compensation:

Rossini v. *Tone*, 7 Conn. Supp. 13;
Boyle v. *Mahoney*, 92 Conn. 404, 103 Atl. 127;
Europe v. *Addison Amusements, Inc.*, 231 N. Y. 105, 131 N. E. 750.

Bankruptcy claims in which musicians were held to have a prior claim on basis claim was for wages due which had been earned in furtherance of bankrupt's business:

In re Caldwell, 164 F. 515.

Maritime Lien—Musicians held employees of vessel:

The Sea Lark, 14 F. (2d) 201 (1926)

Copyright Infringement—Hotel held to have employed musicians in furtherance of business of operating hotel:

Herbert v. *Shanley Co.*, 242 U. S. 591, 37 S. Ct. 323, 61 L. Ed. 511.

Tort Case—Theater held liable for negligence of entertainers employed by theater to entertain patrons:

Rome Savings Bank, 96 Misc. Rep. 188, 161 N. Y. S. 15 (1915).

[4] We include orchestra leaders in the term "musicians" for they are no more than musicians performing a necessary work in the rendition of musical entertainment, and in many instances play as sidemen on many engagements and perform as leaders only when they can obtain employment as leaders. Leaders belong to the same labor union as the sidemen, the American Federation of Musicians, and there is no distinction in the class of membership between sidemen and leaders. Very few leaders have large incomes and financial security. The great majority, by far, have very nominal incomes and are as interested in and as much in need of the benefits of the Social Security Laws as any other class of workmen.

this position of the American Federation of Musicians. This ruling was as follows:

> "The musicians individually do not practice an independent profession in which they offer their individual services to the public generally as in the case of doctors, lawyers, and other like independent contractors This is clearly demonstrated by the fact that the musicians are bound together in a voluntary union which (1) fixes the amount of compensation they shall receive for their services; (2) requires that all musicians in a specific employment shall receive the same compensation, regardless of the particular skill or ability of the individual musician or the type of instrument played; and (3) insofar as possible otherwise prescribes and regulates the conditions under which their services may be performed. These are not the characteristics of independent contractors.
>
> "At most the musicians are no more than highly skilled employees. They are hired to perform personal services and are subject to control and direction on the part of their employers. True, the employers do not have unlimited control over the musicians, but must employ them in accordance with the rules and conditions prescribed by the union. However, the fact that the musicians are in substance thus enabled to require the employers to adhere to certain standards in respect to wages and other conditions of employment does not make them any the less employees. The employers have the right, within the limits prescribed by the union rules, to control and direct the musicians and may exercise their right in respect to such matters and to such extent as considered necessary. Accordingly, the Bureau is of the opinion that the musicians are employees for purposes of the taxes imposed under titles VIII and IX of the Social Security Act". (Opinion, March 13, 1937, No. HT:SS:R.)

At a later time the Bureau of Internal Revenue, upon a reconsideration of its position in regards to the status of sidemen and orchestra leaders came to the conclusion that

persons and establishments engaging orchestras had no right of control over the services of the musicians and that the right of control was in the leader. Thereupon the Bureau of Internal Revenue reversed its position and issued a ruling to the effect that orchestra leaders would be considered as independent contractors and the employers of the members in the orchestras they lead, because the right of control over the manner and method of the performance of the musicians, in the opinion of the Bureau of Internal Revenue, was vested in the leaders and not the persons engaging the services of the musicians.

After the Bureau of Internal Revenue had taken this position, Griff Williams,[5] an orchestra leader, was held by the Bureau of Internal Revenue to be liable for the employer's tax on the premise that those establishments which had engaged the orchestra had not had the right of control over the musicians. Griff Williams was assessed for the employer's tax. He paid the tax, then brought suit on May 15, 1940 to recover the amounts paid, contending that he and the other members of the orchestra had been employees of the establishments in which the orchestra had played. (*Williams* v. *United States*, 38 Fed. Sup. 536). This complaint was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 329). After making extensive findings of fact and conclusions of law, the District Court held that Griff Williams was an employee of the establishments in which the orchestra had played, that the tax had been improperly assessed against him and judgment was entered in his favor. The decision was issued on May 2, 1941 and is recorded in 38 Fed Sup. 536 (later reversed).

In the latter part of December 1940 and in January of 1941 (prior to the decision of the District Court in the

[5] This is the same Williams as the intervener, Williams.

Griff Williams case (*supra*)), the Executive Board of the American Federation of Musicians met and discussed thoroughly this question of the relationship of an orchestra leader to establishments engaging the services of an orchestra, to the end that orchestra leaders and musicians in general might receive to the fullest possible extent the benefits and rights provided for in the Social Security Laws (R. 500-503, 575-577, 623-624).

Conferences were held with the Bureau of Intrenal Revenue as to its existing rules and concerning the circumstances under which members of orchestras, including the leaders, would be employees of establishments engaging their services under the Social Security Laws (R. 500-503, 575). The Bureau of Internal Revenue advised the officials of the American Federation of Musicians that musicians, including leaders, would be employees of the establishments engaging the services of the musicians within the meaning of the Social Security Act, as administered by that Bureau, only if the establishments engaging the musicians and leaders had the right to control the services of the musician (R. 576-587). The International Union thereupon, through its president and pursuant to his powers and authority under Article I, Section 1, of the by-laws of the Union (R. 538), (Interveners' Ex. No. 7), adopted a rule, approved by the Executive Board of the Union, that establishments engaging the services of musicians should expressly have the full right of control over the services of the musicians, leaders and sidemen alike (R. 501-502).

In order that there might be no mistake with respect to the right of control being vested in the establishments, a specific form of contract was adopted by the American Federation of Musicians containing provisions embodying this policy and law of the Federation. Leaders and also booking agencies, engaged in the business of finding employ-

ment for orchestras, were commanded and directed to use that specific form of contract which had been adopted by the Union and none other (R. 14, 503). This contract, known as the Form B contract, was made an integral part of the constitution and by-laws of the Union and was approved by the Convention of the Union which was held in Seattle in June of 1941 (R. 551-553). (See Intervener's Exhibit No. 7 (R. 538); Article XVI, p. 170 of the 1941 Constitution of the American Federation of Musicians (R. 545)). Thus the policy and the rule embodying that policy became an amendment to the constitution and by-laws of the American Federation of Musicians, not only as a result of the action of the president under his powers contained in Article I, Section 1 of the by-laws, but also by the action of the Convention of the Union. Parenthetically, we remark that all of the contracts in issue in this case were entered into after the Convention in Seattle had amended the constitution and by-laws by adopting Article XVI, which is the contract.

After the conferences had been held with the Bureau of Internal Revenue concerning their existing rules and the Union had been advised under what circumstances leaders and musicians would be employees of establishments engaging their services, and after the Union had drafted the Form B contract, it directed one of its members, Ray Heatherton, to perform his services under the terms and conditions prescribed in the Form B contract (R. 507-508). This was done. Thereupon the Stevens Hotel of Chicago, Illinois which had employed Ray Heatherton and the orchestra he led under the terms of the Form B contract, submitted the contract of employment to the Bureau of Internal Revenue for an official ruling as to whether or not the leader of the orchestra and the members of the orchestra were employees of the hotel under the terms and conditions of this particular contract (R.

511). The Bureau of Internal Revenue in reply ruled to the effect that under the terms of the contract the *"RIGHT of control"* of the leader and the musicians was clearly vested in the establishment and that the establishment thereupon was liable for the employer's share of the social security tax (Intervener's Exhibit No. 1 (R. 508-513) (R. 511-517)).

(The ruling of the Bureau of Internal Revenue is set forth fully in Appendix B (*infra*) pg. 68, for the convenience of the Court.)

Nor was this the only occasion upon which the Bureau of Internal Revenue was called upon to decide the issue of whether musicians, including leaders, were employees of establishments engaging their services under the terms of and pursuant to the Form B contract.

In February of 1944 the Bureau reiterated its opinion that musicians performing services pursuant to the terms of the Form B contract were employees of the establishments engaging them and as late as November of 1944, the Bureau issued a bulletin to the same effect (Intervener's Exhibit No. 3 (R. 531, 534)). (Text of Intervener's Exhibit No. 3 set forth in Appendix C, *infra*, R. 70.)

On October 18, 1944, the Bureau of Internal Revenue sent a letter to its Collector of Internal Revenue at Salt Lake City, Utah in answer to a request made by the Collector as to the status of parties under the Form B contract. The Local Collector of Internal Revenue was advised in part as follows: (Intervener's Exhibit No. 2 (R. 518, 527)).

The extended consideration which has been given to the terms of the "Form B" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra

the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchaser for Federal employment tax purposes. Your attention is invited to paragraph two of A&C:IT-Mimeograph Coll. No. 5638.

(Full text of letter set forth in Appendix D, *infra*, pg. 72.)

The Form B contract thus was adopted to remove any doubts as to the location of the right of control over the services of musicians who were members of the American Federation of Musicians in the rendition of their services, and to definitely and finally settle the vexing question, even then pending before the courts (*Griff Williams* v. *United States*, 126 F. (2d) 129), of whose was the right of control over the members of orchestras while rendering their services. The Form B contract placed such right of control unequivocally in the person or establishment hiring the musicians. And the Bureau of Internal Revenue has held that the right of control over the services is in the person engaging the musicians under the terms and conditions of the Form B contract and such person is therefore the employer of the musicians and liable for employer taxes under the provisions of the Social Security Act.

II. Petitioner Was the Employer of Interveners and Members of the Orchestras Led by Interveners under Common Law Concepts.

While some Circuit Courts of Appeals have held that only those who can be considered as employers under the common law are liable for taxes under the Social Security

Act (*Texas Co.* v. *Higgins*, 118 F. (2d) 636; *Anglim* v. *Empire Star Mines Co.*, 129 F. (2d) 914,) others have held that the term "employment" as used in the Social Security Act should be given a more liberal interpretation in determining liability for social security taxes in order that the remedial purposes of the Act might be carried out to the fullest extent. (*United States* v. *Vogue*, 145 F. (2d) 609; *Grace* v. *Magruder*, 148 F. (2d) 679.)

This Court has not spoken directly on this issue but has indicated in decisions involving other statutes concerned with employer-employee relations, that it is erroneous to affix statutory liabilities and responsibilities against only those who would be deemed employers under the common law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 645 S. Ct. 851; *United States* v. *American Trucking Association*, 310 U. S. 534, 84 L. Ed. 1345.

At a later point in this brief we shall present an argument to the Court that liability for employer taxes under the Act is not confined to only those employers who would be considered employers or masters under the common law and discuss the cases cited above; however, at this point in our brief we shall address ourselves to the argument that petitioner was the employer of the musicians he employed pursuant to the terms of the Form B contract under the common law conception of an employer or master.

A. A PERSON MAY REQUIRE AS A CONDITION OF EMPLOYMENT THAT HE OCCUPY THE STATUS OF AN EMPLOYEE OF THE ONE FOR WHOM HE IS TO RENDER SERVICES.

It is a basic and elementary rule of law that the relationship between one performing services for another and the one engaging those services is contractual. 35 *American Jurisprudence*, Sec. 8, page 450; 1 *Corpus Juris*, Sec. 1, page 33; *Younger* v. *Moore*, 135 S. W. (2d) 780; 18 *Ruling*

Case Law, Sec. 3, page 493; *Labatt*, "*Master and Servant*", Volume 1, Section 88, page 316.

Admittedly each employment relationship involved in this case was created and existed pursuant to expressed contracts known as Form B contracts (R. 83, 87, 91, 93, 95, 401). And admittedly the provisions of these contracts expressly and definitely spelled out an employer-employee relationship between petitioner and the musicians, including the leaders, petitioner hired on the occasions involved in this case (R. 120). The contracts provided that petitioner hired the musicians severally, was to be considered the employer of the musicians he hired and was to have the full right of control over the services the musicians were to render for him. That petitioner fully understood the implications of these provisions in the contracts prior to executing the contracts and that he understood that these provisions of the contract gave him the right to control the musicians in the rendition of their services and placed him in the status of an employer in his employment relationship with the musicians, is clear from his testimony, for he stated that he objected to employing the members of the orchestra severally (R. 109), he objected to being designated the employer (R. 109), he objected to having the full right of control over the members of the orchestra (R. 110) and he knew that the contract placed him in the status of an employer (R. 120). Although obviously he was reluctant to occupy the status of an employer in his employment relationship with the musicians he hired, petitioner entered into the Form B contracts expressly establishing the employer-employee relationship between himself and the musicians because that was the only condition under which the musicians would work for him (R. 53, 110-111).

Petitioner certainly then, under the most elementary, basic and fundamental rule of law, became the employer of the musicians he engaged because he contracted to hire them as his employees. Petitioner would not have become the employer of the musicians under the Form B contract only if there is in law some prohibition against a person contracting to serve in the capacity of an employee under some circumstances. This poses the fundamental question involved in this case, namely, *may a person require as a condition of employment that he occupy the status of an employee of the one for whom he is to perform services, or is a person required to perform work for another only in the capacity of an independent contractor even though he expressly refuses to work in any other capacity than that of an employee?*

We know of no law and we find no cases cited in the decision of the District Court nor in the brief of petitioner to the effect that there are limitations and restrictions on the type of relationship one may contract for in performing services for another, or that a person offering his services to another must, against his will, contract to serve in the capacity of an independent contractor and not that of an employee.

It would seem indisputable that a person is free to contract to perform services for another in either the capacity of an independent contractor or as an employee. If a person is willing to sacrifice the right to control the method and the manner and the means by which his work is to be performed, he certainly, under law, should be able to become an employee of the person desiring his services to the same degree that a person may insist on working only as an independent contractor, free from control of others in the performance of his work. This Court in the case of *Standard Oil Company* v. *Anderson*, 212 U. S. 215, 29 S. Ct. 252,

53 L. Ed. 480, recognized this right of parties to contract to perform their services in the status desired, stating:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. . . ."

The musicians throughout the country collectively, through their union, decided that they would sacrifice any right of control they might have had over the manner and the means of performing their services because they felt the advantages to be gained by working as employees were greater than the advantages they might obtain by performing as independent contractors and retaining the full right of control over their work.

Interveners, pursuant to this decision of their union, insisted upon performing their services for petitioner only under contracts vesting in petitioner the full right of control over the services to be rendered. Those were the only contracts of employment between petitioner and interveners for the services for the engagements involved in this proceeding (R. 389).

Clearly and certainly interveners in performing their work pursuant to these contracts occupied the status of employees for that was the status expressly contracted for.

The Circuit Court of Appeals held that these contracts

on their face established the employer-employee relationship that the parties intended them to establish and should be held controlling in the absence of evidence that the parties abrogated or abandoned the contracts, stating (R. 689-690):

> "A contract therefore which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done—such as does the contract here—establishes on its face the legal relationship of employer and employee as it existed at common law. The relationship is capable of being changed, of course, by an abrogation of the provision for control, through either an express agreement of the parties or an implied agreement from circumstances demonstrative of a mutual abandonment of it. . . ."

The District Court, however, held that these contracts of employment did not establish the employer-employee relationship on their face and should be completely disregarded in determining the employment status of the parties. It is in this that the District Court misinterpreted the law and the authorities it relied upon in support of its decision.

1. The Authorities Cited by Petitioner Do Not Support the Proposition That a Contract of Employment under All Circumstances May Be Ignored in Determining the Employment Status of the Parties to That Contract.

The authorities cited by petitioner in his brief and relied on by the District Court do not support the proposition that a contract expressly fixing the obligations of the parties to an employment relationship is of little or no value in determining their status. The authorities cited by petitioner are concerned only with the factors that should be taken into consideration in determining who has the *right of control* over the services to be performed

under a particular contract of hire, *which does not expressly vest the right of control in either of the parties.*

There is perhaps no rule of law more firmly established in determining the status of parties to an employment relationship than the rule that the person having the right of control over the services to be rendered is the employer of those over whom he has such right of control, and it is entirely immaterial and irrelevant whether or not he exercises that control. This rule of law has been *definitely* and clearly stated in case after case by court after court, without variation or contradiction. 35 *American Jurisprudence*, Sec. 3, p. 445; *The Restatement of the Law of Agency*, Vol. 1, Sec. 220, pp. 483, 489; *Treasury Regulations* 106, Sec. 402.204; 107, Sec. 403.204; *Murrelle* v. *Industrial Commission*, 382 Ill. 128, 46 N. E. (2d) 1007; *Industrial Commission of Colorado* v. *Northwestern Mutual Life Insurance Co.*, 88 P. (2d) 560; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819; *Toplis & Harding* v. *Murphy*, 384 Ill. 463, 51 N. E. (2d) 505; *Peasley* v. *Murphy*, 381 Ill. 187, 44 N. E. (2d) 876; *McDermott's case*, 283 Mass. 74, 186 N. E. 231 (1933); *Claus* v. *De Vere*, 120 Neb. 812, 235 N. W. 450; *Simmons* v. *Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119; *Spencer* v. *Marshall*, 107 Kan. 264, 191 P. 468; *Jones* v. *Goodson*, 121 F. (2d) 176; *Griff Williams* v. *United States*, 126 F. (2d) 129 (*supra*).

Seldom, however, does a contract of employment definitely express which party has the right of control over the services to be rendered and, therefore, in the usual case involving this issue, evidence is introduced to establish who selected and discharged the workmen, who determined the compensation to be paid, who paid the workmen's wages, on whose premises were the services performed, who owned the tools or equipment necessary to perform the serv-

ics, and other similar factors, in order to show *which party to the employment contract had the right of control* over the method and manner of the performance of the work. Such factors are merely the means to reach a determination as to whose was the right of control and all such factors become completely immaterial when the contract of employment clearly discloses in which party to the contract the right of control is vested, for that is the ultimate test to which *all other factors are subservient.*

That it is the right of control alone which is the ultimate determinative factor in an employer-employee relationship and not other facts which may merely indicate right of control was clearly expressed by this Court in the case of *Standard Oil Co.* v. *Anderson* (*supra*) as follows:

> "And further (page 225 of 212 U. S. 29; S. Ct. 252, 255: 'In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. *They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control'.*" (Italics ours.) (See also 35 American Jurisprudence Sec. 3, p. 445.)

It is only when the contract of hire does not reveal whose is the right of control that a contract becomes merely "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship" (R. 660) under the authorities cited by petitioner.

The Restatement of the Law of Agency, Sec. 220, does not hold that all contracts of employment regardless of their terms are but one element to be considered in determining the status of parties to an employment relationship. It refers only to contracts in which "the extent of control" is not clearly indicated and thus is in dispute, and holds that under such circumstances it is proper for one to ex-

amine the contract of hire to determine how much control is provided for by its terms along with other factors.

Where the agreement of the parties is definite concerning the question of the right of control, it is conclusive in determining the employment status of the parties. This is the rule of law as expressed in Sec. 221 of the *Restatement of the Law of Agency*, (the section which is concerned with employment relationships in which the status of the parties is clearly defined) as follows:

> "To constitute the relationship of master and servant, the one for whom the service is rendered must consent or manifest his consent to receive the services as a master."

In comment (a) under this section (p. 491) it is clearly and definitely stated:

> "If, however, the one for whom the service is rendered consents to its being performed under his directions and understands that he is in control, the service is rendered by his servant."

Nor does the case of *Williams* v. *United States* (*supra*) support petitioner's position. In fact the decision in that case supports the decision of the Circuit Court of Appeals in the instant case, for both courts looked to the contracts of hire to determine which party had the right of control. The Seventh Circuit Court of Appeals in the *Williams* case stated:

> "*The status of the parties was plainly fixed by the contracts*, including the rules of the Federation, and there is no room for argument that the establishments had any right of control" (p. 132). (Italics ours.)

The Circuit Court of Appeals in this case made the same holding in principle in the following language:

> "On these facts we think it must be held that the parties in their negotiation and execution of the contract had

specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra-members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least" (R. 691).

The case of *Spillson* v. *Smith*, 147 F. (2d) 727, is to the same effect as the *Williams* case (*supra*). The Court looked to the contract of hire to determine the question of whose was the right of control.

In each of the cases cited by petitioner the contracts of employment involved did not designate which party had the right of control over the services to be performed, but merely used descriptive words designating the status of the parties, or the Court found that the parties had functioned in a manner inconsistent with the terms of their employment contract and had thus abandoned it.

We do not contend nor did the Circuit Court of Appeals hold that a desired employment relationship can be created by the use of mere descriptive words in the contract of hire without granting rights and fixing obligations. But we do contend and the Circuit Court of Appeals did hold that, "A contract . . . which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done . . . establishes on its face the legal relationship of employer and employee as it existed at common law" (R. 689).

In the cases of *Williams* v. *United States* (*supra*), *Spillson* v. *Smith* (*supra*), *Hargis* v. *Wabash R. R. Co.*, 12 Labor Cases 70, 327, and others of a similar vein cited by respondents, the courts merely held that descriptive words in a contract of hire can in no way be determinative of the status of the parties.

We do not contend nor did the Circuit Court of Appeals hold that a contract of employment definitely and clearly establishing the status of the parties to the contract may not be varied by acts of the parties in the performance of the contract which are inconsistent with the relationship established by the contract.

In the cases of *Matcovich* v. *Anglim*, 134 F. (2d) 834; *Gulf Refining Co.* v. *Brown*, 93 F. (2d) 870; *Commissioner* v. *Tower*, 327 U. S. 280, 66 S. Ct. 532; 90 L. Ed. Adv. Op. 559; *Bertino* v. *Marion Steam Shovel*, 64 F. (2d) 409, and the rest cited by petitioner, the court found that the conduct of the parties was inconsistent and at variance with the contracts of employment, and on that basis held the contract not determinative of the status of the parties. Had the parties performed the contracts in accordance with their terms and provisions and not substituted other agreements, the original contracts of hire would have been held to have determined the relationship of the parties.

None of the cases cited by petitioner held that a contract of employment expressly vesting the right of control in the employer is not determinative of the relationship in the absence of evidence of acts of the parties inconsistent with the contract.

We acknowledge the law to be that the conduct of the parties in the performance of their contract of hire must be consistent with the terms of their contract and that evidence of inconsistent conduct and acts may establish an abrogation or abandonment of the contract.

2. The Performances of the Form B Contracts by Interveners and Petitioner Were Consistent With the Employer-Employee Relationships Established by Those Contracts

None of the evidence in the instant case establishes any inconsistency between the performance of the contracts of employment and the terms and conditions of those con-

tracts, therefore the employer-employee relationship expressly created by those contracts was not abrogated by the acts or conduct of the parties nor was a different agreement substituted.

a. *Petitioners' failure to exercise control over the services of the musicians was not inconsistent with the employer-employee relationship.*

Evidence concerning the fact that petitioner might not have chosen to exercise all of the control vested in him by the contract of hire and that interveners might have exercised the greater amount of control, does not establish conduct inconsistent with the terms of the Form B contract and the employer-employee relationship established by that contract. Nor is the fact that, "If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment" (R. 662) inconsistent with the terms of the Form B contract.

As we pointed out heretofore, it is the *right to exercise the control* over the work to be performed and not the actual exercise of control that is the determining factor of an employer-employee relationship (*supra* pg. 20-21).

There is nothing particularly unique or unusual in a person having the right of control not actually exercising that control because to do so would interfere with and make unsatisfactory the performance of the work the employer desired to have done. In hundreds of cases employees are hired precisely because they do have a particular skill that the employer cannot perform. For example, a watchmaker in a jewelry shop, a chef in a hotel dining room, a linotype operator for a newspaper, a crew of longshoremen, etc.

It is no different with petitioner and the orchestras engaged in the furtherance of his business of operating a

ballroom. Leaders of orchestras are skilled in the art of directing groups of musicians so that a particular and desirable type of music is produced which attracts patrons to the ballroom in furtherance of the business of operating the ballroom. And it is not inconsistent with the contracts of employment and the vesting of the right of control in the petitioner that petitioner did not choose to interfere with the manner in which the orchestras were operated, for he had engaged the services of persons highly skilled in such endeavor to perform those services for him.

The courts have never experienced any difficulty in answering the arguments of those who would escape their liability as an employer on the grounds that they just could not exercise the right of control; for example, that precise argument apparently was raised in the case of *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819 (*supra*), in which the owner of a boat sought to escape liability for the negligence of his pilot. This Court stated in holding the owner liable:

> "The doctrine that the owners are responsible for the acts of their agents and employes ought not to be discarded because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to conduct a vessel through them. 'As a general rule' says Justice Grier, in the case of The Creole, 'masters of vessels are not expected to be and cannot be acquainted with the rocks and shoals on every coast (and, we may add, with the currents and shoals of every river) nor able to conduct a vessel safely into every port. . . .'"

See also *Toplis & Harding* v. *Murphy*, 384 Ill. 463, 51 N. E. (2d) 505 (*supra*); *Peasley* v. *Murphy*, 381 Ill. 187, 44 N. E. (2d) 876 (*supra*); *Claus* v. *De Vere*, 120 Neb. 812, 235

N. W. 450 (1931) (*supra*); *Simmons* v. *Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119 (1933) (*supra*); and *McDermott's* case, 283 Mass. 74, 186 N. E. 231 (1933) (*supra*), in which it was stated:

> "One may be a servant though far from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control rather than the exercise of it that is the test."

In holding that petitioner was not the employer of intervener because intervener and not petitioner had exercised the greater amount of control over the services of the orchestra, the District Court fell into the error of failing to recognize that while evidence of who actually exercised control over the work performed under a contract establishing an independent contractual relationship is material and relevant to establish a variance between the terms of the contract and the performance of the contract, such evidence is immaterial and not relevant to establish the abrogation or abandonment of a contract which created an employer-employee relationship.

The distinction arises from the fact that an employer may delegate to one of his employees the duty of actually exercising control over other employees,[6] but an independent contractor cannot delegate the actual control over his work to the person for whom he is performing work and function consistent with the contract of employment. To establish an independent contractual relation, the contract of hire must meet two requirements: (1) vest the full right of control over the services to be performed in the independent contractor and (2) divest the person for whom

[6] It might be noted that business is generally carried on by the employer delegating the exercise of control to an employee, often because the employer, through a lack of knowledge and experience is incapable of exercising control.

the work is being performed of all right of control. The exercise of control by the person for whom the work is being performed would therefore tend to establish an abandonment of those provisions of the contract vesting the right of control in the independent contractor and divesting the other party of any right of control. However, since an employer may delegate control to an employee, the fact that the employee and not the employer may actually exercise control in no way establishes a variance with an employer-employee relationship so long as the employer retains the right to exercise control.

The cases cited by petitioner in support of his argument that because interveners exercised control, petitioner was not an employer under the terms of the contract are not in point, for all are concerned with the abrogation of independent contractual agreements because the contracts were not performed in accordance with their terms.

Nor is it material that petitioner did not discharge any of the musicians in the orchestras he employed. The petitioner had the right to discharge any member of the orchestra since he was given the full right of control over the services to be performed, and his failure to exercise this right is not evidence that he did not have the right to do so. Interveners would have carried out petitioner's orders to discharge or hire a member of the orchestra if directed to do so (R. 383, 628-629), and interveners did not refuse and would not have refused to carry out any of petitioner's orders but would have carried out any order given to them (R. 384, 386, 387, 626-627).

If petitioner's argument is at all tenable, an employer could readily escape his tax liabilities by merely delegating control to an employee and refraining from exercising the control while retaining the right to exercise control if he deemed it necessary at any time.

The fact that petitioner did not exercise the control vested in him by the contract, therefore, does not establish any variance between the terms of the contract and the performance of that contract.

b. *The evidence in the record concerning the manner in which the orchestras were formed and functioned does not establish any inconsistency between the performance of the Form B contract and the established employer-employee relationship.*

Nor does the evidence in the record to the effect that the musicians employed had been formed into organized groups by interveners (R. 329), were rehearsed by interveners (R. 355), that interveners handled the distribution of the musicians' wages (R. 359) and arranged the transportation of the musicians to the place of employment (R. 357), sometimes in buses owned by interveners (R. 167), establish any inconsistency between the performance of the contracts of employment and the employer-employee relationship established by those contracts.

(1) Musicians Were Organized Into Groups

The fact that the musicians were organized into groups or orchestras and rehearsed prior to being engaged by petitioner is no more than a necessary circumstance in the unique employment of furnishing musical entertainment. In this field of employment, it is necessary that men band themselves together because their particular skill in the performance of their work is enhanced and their value to those who would engage their services increased as a result of these practices and acts (R. 371). Their individual efforts must blend together so that a highly pleasing harmonious effect is produced which is agreeable to the senses of the patrons of the ballroom. Without that

ability to perform together, their value to the petitioner would be lessened and his profits from their work reduced.

The business man who finds it to the advantage of his particular business to employ men in organized groups or bands is no less an employer than the one whose business does not require the employment of organized groups. The basic legal effect and result of the employment is not altered or changed by the method through which men are employed, by groups or individually, *Spencer* v. *Marshall*, 107 Kan. 264, 191 Pac. 468 (1920) (*supra*). And certainly the mere fact that the musicians involved herein had banded themselves into a group prior to their employment by petitioner in no way establishes an abrogation or abandonment of their employment contract.

(2) Interveners Arranged Transporation

Nor does the fact that interveners arranged for the transportation of the orchestras to the place of employment change the status which existed between petitioner and interveners under the contracts, for that fact is not inconsistent with an employer-employee relationship. The transportation of the orchestra in a group is a factor necessarily inherent in group employment when to obtain employment the group must travel from one engagement to another. It is merely a means of keeping the group together and insuring, to some extent, their arrival at the place of employment. Also, it relieves the employers of musicians of the burden of arranging and providing transportation.

That the means of transportation was maintained by some of the leaders[7] does not abrogate nor affect their con-

[7] Few orchestra leaders own buses and the rules of the American Federation of Musicians closely regulate the charges that can be made for transporting brother members of the Union (R. 255, 368). The record

tracts in any way. See case of *Willard Sugar Company* v. *Gentsch* (59 F. Supp. 82) in which truckdrivers who owned and maintained their own trucks, and even engaged helpers were held to be employees of the concerns using their services.

(3) Petitioner Did Not Negotiate Individual Wages

The fact that petitioner did not negotiate and determine the individual wages of the musicians he employed does not vary the contract nor destroy the employer-employee relationship.

Minimum wages were established by the Union (R. 68). Had petitioner desired to pay more he certainly was free to do so as the employer of the musicians. Petitioner did negotiate the total cost of the orchestra and he did have the right to demand that he be advised of the exact amount paid to each man. His disinterest in ascertaining that information does not relieve him of his employer responsibilities.[8]

But even if, for the purpose of argument only, we accept petitioner's contention that the failure to advise petitioner of the exact wages of each of the individual musicians destroyed the employer-employee relationship (which we definitely contend it did not do), such contention could have no effect on interveners Hill and Fisher for they did supply the information (Pltf's. Ex. T, R. 82, 89; Pltf's. Ex. A-1, R. 99).

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shows that Intervener Moorhead owned a bus, Intervener Williams did not and it is silent as to the other interveners. Usually the leader arranges for transportation by public carrier and under the rules of the American Federation of Musicians, the cost of transportation by public carrier or privately owned buses, must be paid by the person engaging the orchestra (R. 368).

[8] Petitioner testified that in the early days of the Form B contract the information concerning the wages of the individual musician was sometimes omitted from the Form B contract, but at the time of trial this information was provided (R. 113).

The fact that interveners often contracted for a share of the gross receipts does not vary the employer-employee relationship, for employees often work on profit-sharing plans. The laws of the Union, however, require that interveners receive at least Union scale (R. 368).

(4) Interveners Distributed Wages

The fact that the leader of the orchestra might have distributed the wages to the sidemen rather than petitioner distributing the wages himself, surely is not inconsistent with the terms of the Form B contract nor at variance with the employer-employee relationship. The distribution of the wages by the interveners on behalf of petitioner is merely a convenience for petitioner and also is a device by which the Union may more easily police its members and make certain that all are receiving the minimum wages required by the laws of the Federation, and not "kicking back" to the employer.

The method and manner of compensation is neither important nor controlling in determining whether or not the relationship of master and servant existed, and the fact that the petitioner did not personally hand over the wages to the individual musicians does not abrogate the contract of hire. See *Jones* v. *Goodson*, 121 F. (2d) 176 (*supra*) and cases cited therein at page 179.

(5) Musicians Furnished Own Instruments

Concededly, the musicians furnished their own instruments except the piano. But this is not inconsistent with an employer-employee relationship. It is only one of the factors usually taken into consideration to determine who had the right of control over the services in an employment relationship, because once it is ascertained who had the right of control over the services, the status of the parties to the employment relationship is immediately apparent. If the right of control is clearly vested in one of

the parties by the contract of hire one examines facts only to determine if that conract was abandoned or abrogated in ascertaining the relationship of the parties.

(6) No Material Change in Manner Orchestra Actually Operated

Even if we concede that the manner in which the orchestras functioned after the adoption of the Form B contract was the same as before its adoption, that fact would not establish any inconsistency between the terms of the contract establishing the employer-employee relationship and the performance of that contract.

Assuming that interveners were independent contractors in their respective employment relationships with petitioner prior to the Form B contract, the answer to petitioner's argument that because of this fact interveners were not employees of petitioner in their respective employment relationships under the Form B contract is simple and best phrased by an interrogation, namely: Is a person who once performed work for another in the capacity of an independent contractor barred in law from performing similar work for that person in the status of an employee?

If interveners were indeed independent contractors in their respective relationships with petitioner under the contracts of hire used prior to the Form B contract, and if, because of this fact they may not again perform work for petitioner in any status other than that of independent contractors unless they break up the organized groups, require petitioner to direct and rehearse the orchestra, select the musical arrangements, provide for transportation, etc., then petitioner's argument is tenable. But if there are no such restrictions in law, then that fact is completely immaterial in determining the relationship of the parties.

An examination of the decision of the court in the case of *Williams* v. *United States* (*supra*), would seem pertinent at this point since the Williams involved therein is the same

Williams who is an intervener in the instant case, and it was he who testified that there was no material difference in the manner in which the orchestra's services were performed for petitioner after the Form B contract. The decision of the Seventh Circuit Court in that case will conclusively demonstrate that had the parties performed the engagements involved therein pursuant to the Form B contract, Williams would have been held the employee of the establishments engaging his services and also the members of the orchestra because the establishments would have had the right of control over the services to be rendered. The Court held in the *Griff Williams* case that the contracts between Griff Williams and the establishments engaging the orchestra determined the status of the parties (*supra* pg. 22).

The Court clearly indicated in the following language that had the contracts of the parties vested in the establishments the right of control over Griff Williams and the musicians, Griff Williams would have been held an employee even though the establishments did not actually exercise control:

> "The test usually employed for determining the distinction between an independent contractor and an employee is found in the nature of the amount of control reserved by the person for whom the work is done. There seems to be no dispute but that the employer-employee relationship exists only where the person for whom the work is done has the *right of control* and directs the work, not only as to the results to be accomplished by the work, but also as to the details and means by which that result is accomplished. . . . Plaintiff agrees that '*it is the right and not the* exercise which is the determining element.'" (Italics supplied.)

Thus had Williams submitted himself to the control of the establishments for which he rendered services, he would have been held their employee. After June of 1941 he, as well as all other interveners, did submit himself to the control of petitioners in the performance of their work, and by so doing they became employees of petitioner, unless in law, they were restricted from performing their work in any status other than that of independent contractors.

It follows that there is no inconsistency between the employer-employee relationship created by the contract between petitioner and interveners and the fact that interveners might have changed the personnel of the orchestra at times prior to the engagements with the petitioner. Assume interveners had the right to change the personnel of the orchestra and had exercised that right prior to their engagements with interveners, certainly they could surrender that right to petitioner and vest it in him while performing services for petitioner.

Petitioner relies upon the case of *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, to support an argument that the Form B contracts did not create the employer-employee relationship because in some respects the orchestras might have functioned similar to the manner in which independent businesses are sometimes operated. The case of *Metcalf & Eddy* v. *Mitchell*, however, does not support this contention of petitioner. In fact the case of *Metcalf & Eddy* v. *Mitchell* would seem to support the contention of interveners that they could perform their services as employees if they submitted to the control of those who would engage them, the court stating:

> "Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors. *The*

> *record does not reveal to what extent, if at all, their services were subject to the direction or control* of the public boards or officers engaging them. . . ." (Italics ours.)

Thus had the engineers involved in that case subjected themselves to the direction or control of the public boards or officers engaging them, they would have been held employees and not independent contractors.

But even assuming for the purpose of argument that the formation of the orchestras by interveners and the manner in which interveners' names were advertised by booking agents, and the manner in which the orchestras operated in regards to the changing of personnel and the obtaining of employment,[9] made interveners independent contractors and the employees of the musicians while the orchestra was not engaged in the performance of musical entertainment (a status we contend was not created by these factors), that would not change the relationship between petitioners and interveners on the occasions involved herein and would not have constituted acts inconsistent with the employer-employee relationship created by the Form B contract.

As stated by the Circuit Court of Appeals (R. 694):

> "Clearly, a person can be an independent contractor in one part of his activity and an employee in another. Cf. *Coules* v. *J. C. Mardis Co.*, 192 Ia. 890, 181 N. W. 872. And, even if the general relationship of a leader to his orchestra-members outside the specific engagements was such that the Commissioner of Internal Revenue could have insisted that the leader should pay social security taxes on his orchestra-members

[9] Some orchestra leaders in order to hold the group together paid certain amounts to the sidemen each week. The record does not show which of interveners had such arrangements with the sidemen, but it does show that Williams at least had no such arrangement and the members of the orchestra he led received pay only when they worked, just as Williams' income depended upon finding employment (R. 367, 390-391).

all the way down the line and that the brief legal relationships of employer and employee created with the ballroom operators would be ignored for practical purposes of the Treasury in collection or handling or for other reason, this would not help the ballroom operators here. The Government not infrequently has the right to choose between legal and practical situations in tax matters, *Higgins* v. *Smith*, 308 U. S. 473, 476, 477, 60 S. Ct. 355, 84 L. Ed. 406, but the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice. Courts are concerned only with the legality of what is done in matters of taxation and not with the wisdom or policy of the action."

3. Interveners Met Every Requirement in Law to Create the Employer-Employee Relationship and to Perform Their Services Pursuant to That Employment Relationship.

If musicians, playing in organized groups, are not able to render their services as employees through the means of submitting themselves to the direction and control of their employer by vesting in their employer by expressed contract, the full right of control over their services, then how can such a status be created?

Must the musicians disband their orchestras and require those who must employ musicians in the furtherance of their businesses to hire musicians individually rather than in groups?

Must orchestras function without leaders, leaving up to the operators of the ballrooms the task of ordering rehearsals, determining the costumes, arranging and seating the musicians and actually directing the orchestra in the performance of its service, in order for the musicians to obtain the status of employees of those engaging their services?

To be an employee, must a leader refuse to arrange for the transportation of the members of the orchestra?

If the musicians insist that they receive their wages provided for in the Form B contract from the operator of the ballroom himself rather than through the leader, can they then become employees of the ballroom operator?

Must the petitioner personally negotiate the wage of each individual musician before they can perform their services as his employees?

Shall they refuse to furnish their own instruments, and other equipment?

Just what more could interveners have done to establish an employer-employee relationship between themselves and petitioner than was done by the Form B contract?

Had the petitioner hired any one of the interveners individually as a leader, and then hired severally ten or twelve other musicians, there would have been no difference in the way the assembled orchestra would have operated. The job of judging the merits of the musicians, of directing the orchestra, arranging the seating, determining the instrumentation, selecting the music, working out the arrangements and musical effects, and all the other necessary incidentals to musical entertainment would have been left to the particular intervener hired, for he would be talented and skilled in such matters, and he would have been hired to exercise that talent and skill in the furtherance of petitioner's business. If petitioner was dissatisfied, wanted a certain man hired or another one fired, wanted different seating arrangements, wanted different musical arrangements, he could order his desires carried out. And he could have done all this under the Form B contract.

If, then, it is lawful for a person or a group of persons to insist that they will perform work only under an employer-employee relationship, the musicians involved in the instant case could not have done more to obtain this relationship than was done in this case.

Only if the intervener's contracts were subsequently varied either by agreement of the parties or by their conduct and acts in the performance of the contracts could it be held that their status was changed. There is no evidence in the record of any variance between the performance of the contract and the terms of the contract.

The fallacy of the reasoning of petitioner and the District Court, that a contract of hire expressly and definitely fixing the obligations and status of parties is of little or no consequence and may be ignored as though it never existed in determining the status of the parties to the employment contract, is immediately apparent when viewed in the light of the following hypothetical case: Assume that the petitioner decided that there might be times when an orchestra might not function as he felt it should in the interest of his business of operating a ballroom and that he would therefore engage members of orchestras only on an employer-employee relationship basis so that he would have the full right of control over the musicians, the leader included, in the performance of their work. And assume that pursuant to that decision he had insisted upon hiring interveners only under contracts expressly providing that he, petitioner, should be the employer, should hire the musicians severally and have the right of control over the members of the orchestra in the performance of their services. (Assume a contract identical in every respect with the Form B contract). And assume that the contract was performed just as the evidence shows the contracts in the instant case were performed, and that all of the facts and circumstances were identical to the instant case.

Could **petitioner** seriously argue that under such circumstances the contract of employment did not create on its face the employer-employee relationship and that it was not controlling but should be disregarded in determining petitioner's tax liability under the Social Security Laws?

Could petitioner contend that since he had not desired to actually exercise his right of control he was not the employer? Could petitioner contend that since the orchestra leader had previously formed the orchestra, had arranged the means of transportation to the ballroom, rehearsed the orchestra, arranged the seating of the orchestra, determined the program, and actually directed the orchestra in the performance of the work, he, the petitioner, was not the employer even though he had insisted upon hiring the members of the orchestra only as his employees and had insisted that the full *right* of control be vested in him under the contract of hire? If intervener had objected to entering into such a contract and wanted to perform as an independent contractor and became a party to the contract when employment was available only on the terms stated by petitioner, could petitioner argue successfully that intervener and not he was the employer because of this fact?

Obviously, the contract would be held controlling concerning the status of the parties to the employment relationship because such contract would have created by its terms the employer-employee relationship in the first instance and it would have been performed consistent with its terms.

Yet, the only difference between that situation and the facts in the instant case is the party which insisted upon the employer-employee relationship as a condition of employment.

If the interveners were able to contract to perform their services as employees of petitioner, then none of the arguments of petitioner in support of his position that the petitioner did not have the right of control are tenable. If it can be said that the factors relied on by petitioner affect the relationship of employer-employee as expressly created by the contract of hire, "It is the equivalent of saying that the leaders and members of organized orchestras are un-

able legally to become employees of those for whom they perform engagements." (Majority Opinion, C.C.A. (R. 693).)

All of the factors now relied on by petitioner to escape his obligations as an employer, "were known to the parties at the time the contract was made and to which they manifestly chose to give no significance in obligationally fixing the power of control to create an employer-employee relationship for the particular engagements" (R. 698). And it would have been no different had **petitioner** insisted upon occupying the status of an employer.

Surely, then, the contracts involved in the instant case established the employer-employee relationship and must be held controlling in determining the employment status thereunder in the absence of any evidence of an abrogation or abandonment of those contracts.

4. The Form B Contracts Cannot Be Ignored in Determining the Status of the Parties Thereunder Because They Allegedly Were Not Entered Into by Fair Negotiations.

The District Court held (R. 663) and the petitioner contends that the contracts of employment involved herein did not create an employer-employee relationship and should be ignored in determining the status of the parties because they were not entered into as a result of fair negotiations.

The Form B contracts involved herein were no more and no less than the result of collective bargaining between the members of the Musicians Union and those who would engage the services of musicians, members of the Union. Union members would render services only under the terms of this uniform agreement. All that possibly can be inferred from the evidence in the record is that petitioner could obtain the services of musicians, who were members of the American Federation of Musicians, only under the

terms and conditions of employment that those members collectively, through their Union, prescribed and not upon the terms and conditions of employment that petitioner desired (R. 53, 110, 123, 125).

The fact that members of a labor organization will render services only under a particular contract prescribing particular terms and conditions of employment, does not make such a contract invalid under any doctrine in law or equity, when entered into by one desiring, or in fact even requiring, the services of the members of the Union.

As stated in *Maisel* v. *Sigman* (1924) 123 Misc. 714, 205 N.Y.S. 807:

> "Workingmen are at liberty to withhold or to give their labor upon such terms as to them seem proper, so long as they do not violate an express contract or statute, and so long as their primary object is not the gratification of personal malice;"

See also *Coppy's Inc.* v. *Dongan* (1943) 46 N.E. (2d) 538; *Glicman* v. *Barker Painting Co.* (1930), 227 App. Div. 585, 238 N.Y.S. 419.

Surely in the instant case the means employed by interveners to obtain the conditions of employment they desired was not unlawful. No threats were made to prevent petitioner from operating; in fact there was not so much as a request made that petitioner not employ non-union musicians. All that was done was that petitioner was informed that interveners would render services only under the conditions of employment provided for in the Form B contract, and petitioner was forced through this use of economic pressure to contract to employ the musicians as his employees (R. 53, 110, 123, 125). This we submit does not constitute grounds for voiding the contracts and refusing to hold that an employer-employee relationship was established by their terms.

The conventional manner by which organized workmen are able to obtain those conditions of employment which they desire, is to withhold their labor and the conventional means by which an employer is able to obtain workmen under the terms of employment he desires is to refuse to hire workmen under any other terms or conditions of employment than those he offers. When the parties disagree on the terms and conditions of employment that should prevail, a labor dispute, to a greater or to a lesser degree, is the result. The agreement which ultimately might result and bring about a termination of the dispute surely is not an invalid agreement because one of the parties would not offer employment, or one of the parties would not accept employment, under the terms originally proposed. If such an agreement were held to be invalid and one that may be disregarded in determining the rights and obligations of the parties prescribed therein, then collective bargaining becomes a useless and meaningless thing.

Had the disputed terms of the contracts involved herein been over wages to be paid and had petitioner met the demands of the musicians because they would not work for the amount petitioner might have proposed, could the petitioner claim the contract was not binding upon him—even after the musicians had rendered their services—because he had objected to the amount of the wages demanded by the musicians prior to hiring them? Of course not. Then on what basis can it be contended that the Form B contracts in the instant case are invalid and of no materiality in determining the status of the parties because the musicians insisted on working under certain specified terms and conditions of employment?

5. Petitioner's Contention That He Justifiably Believed the Form B Contract Did Not Create the Employer-Employee Relationship, Is Not Supported By Any Evidence and Cannot Change the Status of the Parties under the Clear Language of the Contract.

The petitioner could not have justifiably believed that the Form B contract did not create the employer-employee relationship. The record in this case clearly establishes, without one iota of testimony to the contrary, that petitioner knew that under the terms of the Form B contract he would occupy the status of the employer of the musicians.

Petitioner testified that he read the contract and objected to those parts of the contract which would make him the employer of the members of the orchestra (R. 104, 108-110). He testified that he knew the contract changed the employment status, stating (R. 120):

"Q. Well, did you object to the contract because you thought it was changing the status?

A. Changing the status how?

Q. That it made you the employer of these side men?

A. That's right.

Q. And yet you signed the contract, isn't that right?

A. I had to stay in business.

. . . . . .

"Q. Now let me ask you, Mr. Barjels; am I correct that you objected to signing this contract because you thought it changed the status?

A. Yes.

Q. Now did you continue to think it changed your status and your relation to the musicians?

A. I still do.

Q. And you did all the time, is that correct?

A. That's right."

In support of his contention that petitioner could justifiably believe that the Form B contract did not change his status, petitioner cites testimony to the effect that on one occasion a booking agent told him that the Form B contract would not change his status (R. 116). But there is not one word of testimony in the record that this booking agent had any authority to vary the Form B contract. In fact the record shows clearly that petitioner knew the contract could not be varied by this booking agent and that union musicians would perform for him only in the status of employees. Petitioner testified in this regard as follows (R. 118, 119).

"Q. And you knew at that time that Mr. Petrillo was President of the American Federation of Musicians?

A. Yes, sir.

Q. And you knew too that the members including the side men and leader who were to play under this contract were members of the American Federation of Musicians, didn't you?

A. Yes, sir.

. . . . .

Q. Did you know that the rules of the American Federation of Musicians were binding on you?

A. They were binding on me and also on the orchestra leader."

But even if the unauthorized statement of the booking agent relied on by petitioner did vary the particular contract entered into on the particular occasion when the statement was made (but we definitely state it did not and could not vary the contract), the other contracts involved in this case were not varied by any purported waiving of their conditions by interveners or any booking agent (R. 120, 121, 123, 124) and the evidence cannot affect the relationship of petitioner and the other interveners.

We acknowledge the fact that petitioner did not wish to sign the contract containing provisions which would make

him the employer. When he found out that the interveners insisted upon that provision in the contract or they would not enter into his employment, petitioner executed the contract (R. 53). Obviously, he entered into the contract because he felt that in the furtherance of his business it would be more to his advantage to accept the full right of control over the orchestra, employ the members of the orchestra severally and become the employer of the musicians, than to hire other musicians, less skilled, under some other terms and conditions of employment. But that is not evidence that petitioner had justification for believing that the Form B contract did not place him in the status of an employer in relation to the musicians.

The terms of the contract were perfectly clear. When petitioner entered into that contract he assumed the status of an employer and he cannot now escape his liabilities on the basis that he had justification for believing the contract did not accomplish that which it was specifically and expressly designed to accomplish.

6. The Incorporation of the By-Laws of the American Federation of Musicians by Reference Into the Form B Contract Did Not Change the Employer-Employee Relationship Created by That Contract.

Petitioner's contention that the Form B contract did not create the employer-employee relationship because it incorporated the by-laws of the American Federation of Musicians is untenable. When the Form B contract was promulgated by the president under the powers of Article I, section 1 of the Constitution of the American Federation of Musicians, and was affirmed by the Convention and incorporated into the By-laws and Constitution of the American Federation of Musicians and made a part thereof, all of the provisions of the Constitution and By-laws contradictory to

the Form B contract were thereby either automatically repealed or modified. This is an established principle of statutory construction. As stated in 50 *American Jurisprudence*, Sec. 34, p. 333:

> "Indeed, one of the recognized rules of construction of statutes is to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and the defects in the old law sought to be remedied by the new statute . . . Accordingly, every statute which is properly the subject of judicial construction should receive such interpretation as will not conflict with general principles, but, to the contrary, which will make it harmonize with the pre-existing body of law."

See also *McGraw* v. *Seigal*, 221 Iowa 127, 263 N. W. 553

Further, the Form B contract expressly vests the right of control in the party engaging the services of the musicians, and it is undisputed that the purpose of the Form B contract was to create the employer-employee relationship. It is a settled rule of contract interpretation that a contract will be interpreted to carry out the intention of the parties and in the event of conflict in the provisions, the contract will be interpreted to carry out its main purpose.

As stated in 3 *Williston on Contracts*, Sec. 619, p. 1781:

> "The Court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless and inexplainable, and if this is impossible, an interpretation which gives effect to the main apparent purpose of the contract will be favored."

The contracts involved in this case then clearly and unequivocally vested in petitioner the full right of control

over the musicians in the performance of their work for petitioner, and under the universally established rule of law where petitioner accepted this right of control and the musicians expressly submitted to the control of petitioner, an employer-employee relationship was created between petitioner and the musicians petitioner engaged.

B. THE FORM B CONTRACTS CANNOT BE DISREGARDED IN DETERMINING THE RELATIONSHIP OF THE PARTIES ON THE GROUNDS THAT IT WAS ENTERED INTO TO ESCAPE TAXATION.

Petitioner further argues that the contract of employment should be disregarded because the District Court found that the contract "was required by the leader to be entered into as an anticipatory arrangement to escape taxation" (R. 663). There are two simple and direct answers to that argument: (1) the Form B contract was not an anticipatory arrangement to escape taxation and there is not one iota of evidence in the record that it was; and (2) in any event a taxpayer may lawfully change his status to avoid taxation.

(1) The Form B contract was not an anticipatory arrangement to escape taxation.

We acknowledge that the law is well established that taxpayers cannot deprive the government of taxes through the medium of artfully drawn contracts, unreal corporations or any other anticipatory arrangements if there is no actual change in the status of the taxpayer. This is the law as expressed in the cases of *Griffith* v. *Commissioner*, 308 U. S. 355; *Moline* v. *Commissioner*, 319 U. S. 436. However, the instant case does not involve any effort to escape taxation. The Form B contracts were neither adopted by the American Federation of Musicians, nor entered into by the parties in the instant case for the purpose of depriving the government of taxes; and the law, as expressed in the cases

of *Griffith* v. *Commissioner* and *Moline Properties* v. *Commissioner*, is not applicable here.

In all of the cases which have come to our attention involving the question of whether or not a contract or a corporation, or some other arrangement, was real or merely a sham to evade and escape taxation, the department of the government charged with the responsibility of ferreting out tax-evasion schemes and protecting the government from tax evasion, was the moving party to expose the sham devised by the taxpayer to escape taxation. Such is not the case here. In fact just the opposite situation exists in this case: Here the government on numerous occasions has given serious consideration to the type contract involved and has issued its official rulings that persons engaging the services of musicians under the terms of the Form B contract are liable for social security taxes (R. 509-535).[10]

Had there been any evidence of fraud or bad faith in the Form B contract, or had the slightest intent been apparent to employ the contract for purposes of tax evasion, the Bureau of Internal Revenue would never have decided as positively as it has decided, on the numerous occasions in which the question has been raised, that in regards to engagements played pursuant to the provisions of the Form B contract the leader and members of the orchestra are the employees of the establishment engaging their services.

If the Form B contract is no more than a fraud, not actually establishing the status of the parties to the contract but a device to evade taxation, then the Bureau of Internal Revenue is a party to a fraud and tax-evasion

[10] It is significant these rulings came after the decision in the *Griff Williams* case (*supra*), 126 Fed. (2d) 129, in which the Seventh Circuit Court of Appeals had decided in favor of the Government's contention and had held that under the provisions of the contracts of employment before it (not Form B contracts) the orchestra leader had the right of control over the members of the orchestra and was the employer.

scheme because the Form B contract was fully discussed with officials of the Bureau of Internal Revenue prior to its adoption as an amendment to the Constitution and By-laws of the American Federation of Musicians, and the Bureau of Internal Revenue after fully investigating the nature of the operations and functions of orchestras approved the Form B contract and issued its official rulings.

If the petitioner is contending that the government and the interveners are in a conspiracy to assess taxes wrongfully against him, let him make such allegations in a complaint and prove them in court. Such allegations are not made in the instant case, and no such proof was offered at the trial.

The American Federation of Musicians, prior to the adoption of the Form B contract, had consistently taken the position that the members of orchestras, including the leaders, were the employees of the persons or establishments engaging the services of orchestras and that the members and leaders of orchestras were subject to the direction and control of the person engaging their services. This was the position taken by Griff Williams, a member of the American Federation of Musicians, in the case of *Griff Williams* v. *United States* (*supra*). The Treasury Department disagreed with this position. The United States District Court in its decision in the *Griff Williams* case (*supra*) sustained the position of the American Federation of Musicians. (*Griff Williams* v. *U. S.*, 38 Fed. Sup. 536 (*supra*).) It was after this favorable decision had been handed down and before the Circuit Court of Appeals had reversed the District Court, that the American Federation of Musicians adopted the Form B contract and incorporated it into its Constitution and By-laws and required its members to render services only under this contract.

The principal purpose of the Form B contract was, as President Petrillo stated it to be in his letter to the Local Unions directing the use of the Form B "for the purpose of protecting our members under the Social Security Laws" (R. 659). But that does not make the Form B contract a tax evasion scheme.

The ramification of the decision of the members of the Union to render services only as employees of those engaging their services go far beyond the mere question of payment of Social Security taxes.

The members of the Musicians Union were willing to contract unequivocally to submit to the control of their employers and accept whatever disagreeable effect the exercise of that control might have upon them because they felt the advantages to be gained outweighed the resulting disadvantages. By working as employees not only would they gain their primary object of protection under the Social Security Laws, but they would be covered by Workmen's Compensation Laws; they would have priority claims in bankruptcy proceedings; leaders would not be liable for the negligence of sidemen; the records an employer is now required to keep in the operation of his business concerning withholding taxes, expenses accrued, wages paid, etc., would not have to be maintained by leaders, and musicians generally would have wider coverage under Workmen's Compensation Laws and Social Security Laws because musicians in small orchestras would not be excluded from coverage because of an insufficient number of employees.

There are advantages and disadvantages to performing work as an employee, and surely one of the most minor of disadvantages of working in the status of an independent contractor is the payment of social security taxes, amounting in this case, involving six different orchestras, to but $20.98.

The Form B contract clearly then was adopted for the purpose of unequivocally and certainly giving all right of control over the members of orchestras and leaders to the establishments engaging their services, and to make certain that there could be no further misunderstanding or ambiguities concerning the status of leaders and musicians in general in their relationship to those employing their services because at the time of its adoption the Federal District Court had sustained the position of the musicians and held their employers had the right of control.

There are numerous cases of efforts at tax evasion wherein an employer has contrived some scheme by which he claims to have divested himself of the right of control over his employees but actually has retained the right of control. (See *Matcovich* v. *Anglim* (*supra*).)

It will be observed that in each case the scheme of the employer to evade the taxes consisted of reducing the number of his employees, thus depriving the government of both the employee and employer share of the tax. The Form B contract does not do this; in fact the Form B contract increases the number of employees and increases the revenue of the Federal and State Governments under the Social Security Laws. The musicians, sidemen and leaders alike, under the Form B contract, are liable for employees' taxes under the Act. And, rather than being defrauded of revenue, the government gains the revenue of the leaders' payment of an employee's tax or contribution.

Thus there cannot possibly be any tax evasion under the Form B contract.

(2) A taxpayer may lawfully change his status to avoid taxation.

If it is an unlawful scheme of tax evasion and a fraud upon the Government for a person or a group of persons collectively to feel that the advantages of working as an

employee outweigh the disadvantages, and to sacrifice the right of control over the performance of their work for another and to insist upon performing services only as an employee in order that they might gain and participate in these advantages, including the benefits of the Social Security Laws, we know of no decision so holding with the exception of the decision of the District Court below.

This Court has stated the contrary to be the law. In the case of *Gregory* v. *Helvering*, 293 U. S. 465; 55 S. Ct. 266; 79 L. Ed. 596, this Court stated, "The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them, by means which the law permits cannot be doubted." In the case of *Commissioner* v. *Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Op. 559 (*supra*), this Court reaffirmed and expressly did not "reject that principle," but held "There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other purposes." (See also *Doll* v. *Commissioner*, 149 F. (2d) 239, in which it was held: "The family relationship does not preclude arrangements between its members which will affect tax liability").

The contracts of employment involved in this case cannot then be disregarded in determining the relationship of the parties because under the terms of those contracts employer-employee relationships were created as a matter of law and by the intent of the parties. And there is no evidence to show that the parties varied these contracts by the manner in which they were performed.

Since the parties contracted a particular employment status by expressed contract, that contract must be held conclusive of the intention of the parties thereto in the absence of evidence establishing a subsequent variance of the contract.

C. THE TERMS OF THE WRITTEN FORM B CONTRACTS CANNOT BE VARIED BY PAROL EVIDENCE UNDER THE CIRCUMSTANCES OF THIS CASE.

In the instant case the parties clearly set forth their obligations to one another in the Form B contract. The interveners accepted the obligation of submitting themselves to the control of the petitioner and the petitioner accepted the right to control the services of the musicians and became obligated to the interveners as interveners' employer.

Had interveners known that petitioner would not accept his obligations as an employer after he expressly agreed to occupy the status of the employer of the musicians, they would not have rendered services for him. And if they had, they might well have required other terms and conditions of employment, for they would then have had to accept the obligation of an employer; pay workmen's compensation premiums; accept liability for negligence; employ a clerk to keep records of withholding taxes; arrange for payment of social security taxes before leaving the jurisdiction of the Collector of Internal Revenue; ascertain and abide by the laws of the state governing the obligations of employers and the rights of employees, and meet all of the other requirements of an employer.

This is no action to rescind or modify a contract. There is no allegation of mistake. There is in fact not even a suggestion that the terms of the contract are ambiguous and require an explanation. There is only petitioner's desire not to be bound by those provisions of the contract he disliked after having accepted the performance of interveners. We know of no doctrine or principle of law which allows a party to a contract to disavow and reject his obligations under a contract after enjoying all of its benefits.

The District Court, however held that, "The purpose of a contract is to express the intention of the parties regard-

ing such matters. As between parties, the agreement is generally conclusive as to such intent, but as against a third person, the true intent may be shown" (R. 662).

We acknowledge the law to be as stated by the District Court, that is, that as against a third party, the written provisions of a contract may be varied by parol evidence, but this does not mean that one of the parties to the contract can claim the contract is different than it is, absent an allegation of fraud, mistake, duress or some other basis in law for the rescision or voidance of the contract.

Williston on Contracts, Volume 3, Section 647, page 1867, clearly states the law with relation to the right of third parties to vary the terms of a written agreement to be as follows:

> "• • • if a transaction is in *fraud* of the rights of third persons, it may be shown by parol that the written contract is a scheme, or part of a scheme, *to defraud them*, though in an action between the parties, the writing might be taken at its face value. Furthermore, it does not follow from the parol evidence rule 'that a written contract between A and B, which is conclusive as to them, must be of necessity so, as to the proof of any rights or claims of A against C merely because they grow out of the same business' • • •
>
> "But where the issue in dispute, even between third parties, is what are the obligations of A and B to one another—and those obligations are stated in a written contract, the parol evidence rule is applicable. The written contract represents the truth and the whole truth of the contractual obligations of A and B in whatever way and between whatever parties an inquiry as to such obligation may become important. To admit parol evidence to the contrary which would not be admitted as between the parties except for the purpose of showing either *fraud* against the third person *or some invalidating fact* which would be available to the parties themselves, is to permit facts to be shown which have no relevancy to the issue of what is

the contract between A and B." (Italics supplied.) See also *Root* v. *Robinson*, 55 F. (2d) 303, 80 A. L. R. 471.

In the instant case the parties clearly set forth their obligations to one another in the Form B contract. The interveners accepted the obligation of submitting themselves to the control of the petitioner and the petitioner accepted the right to control the services of the musicians and became obligated to the interveners as interveners' employer. These facts cannot be varied by any parol evidence and are conclusive as to the parties to the contract. *American Crystal Sugar Co.* v. *Nicholos*, 124 F. (2d) 477. As stated in *Labatt, Master and Servant*, Volume I, Section 96(b):

> "When the parties, after conversation and preparation, have at last reduced their agreement to writing, the instrument so drawn up is regarded as the exact expression of their wishes and oral evidence will not be received for the purpose of introducing new terms which will essentially change its meaning and effect."

D. THE CIRCUIT COURT OF APPEALS DID NOT SUBSTITUTE ITS FINDINGS FOR THOSE OF THE DISTRICT COURT, BUT FOUND THAT THE DISTRICT COURT ARRIVED AT ITS FINDINGS BY THE APPLICATION OF A WRONG PRINCIPLE OF LAW.

The Circuit Court of Appeals did not substitute its findings for those of the District Court. The difference in the decisions of the two courts was arrived at from a legal and not factual approach.

The District Court held, as a matter of law, that the contract of employment could be ignored in determining the employment relationship between the parties. The Circuit Court held that the contract could not be ignored but must be presumed in the first instance, to have created the relationship intended by the parties.

If the interveners, under the facts in this case, could

not have created by their contracts of hire the employer-employee relationship as a matter of law because the orchestras had previously been formed, because interveners arrange transportation, because petitioner did not choose to exercise his right of control and because of all the other factors relied upon by the District Court to support its findings, then the District Court was right and the Circuit Court erred. But if interveners could contract to perform their services as a matter of law by submitting themselves to the control of petitioner, then the Circuit Court is right and the District Court erred because interveners did contract to vest control in petitioner, and the performance of their services was not inconsistent with that provision of the contract.

Had Matcovich in the case of *Matcovich* v. *Anglim* (*supra*) performed his contracts of hire in accordance with their terms and had not exercised control, the independent contractual relationship would have existed. (*Anglim* v. *Empire Star Mines Co.*, 129 F. (2) 914) (*supra*).) Had the husband and wife shared the proceeds of the business and conducted themselves like partners in the case of *Commissioner* v. *Tower* (*supra*) their partnership contract would have been held to have created an actual partnership. (*United States* v. *Isham*, 17 Wall. 496, 21 L. Ed. 728; *Gregory* v. *Helvering* (*supra*).)

Had the District Court found facts which established a variance in the performance of the contract with the terms of the contracts, such facts would have been material to show an abrogation of the contract of hire, and the courts conclusion that the employer-employee relationship did not exist would have been supported. The District Court found no evidence of abrogation nor of a variance between the terms of the contract and the performance.

As pointed out heretofore had petitioner demanded that interveners work as his employees and all the other facts

of the case were the same, petitioner could not contend the contract did not establish the employer-employee relationship. *The only fact then upon which the District Court can support its findings is that intervenors and not petitioner demanded that the employer-employee relationship exist.*

Thus, the Circuit Court of Appeals did not in any way substitute its findings for those of the District Court, but found the District Court erred as a matter of law.

III. The Term 'Employee' as Used in the Social Security Act Should Not Be Interpreted in the Light of the Common Law But in the Light of the Broad Social Objectives of the Social Security Act.

The District Court limited its inquiry of petitioner's liability for the taxes, subject of this case, to the question of whether or not petitioner would be considered the employer of the musicians he engaged under the common law. We have shown in our preceding argument that the District Court reached an erroneous conclusion as to petitioner's liability for the tax under this narrow basis for liability for employer taxes under the Social Security Act. We now address ourselves to the argument that the Court erred in holding that liability for employer taxes under the Social Security Act is limited to employers under the common law.

Whether a person is an employer or an independent contractor in the performance of work for others should be determined in the light of the purposes and objectives of the Social Security Act rather than in the light of the common law conception of master and servant. It is only by such means that the purpose of legislation can be carried out in accordance with Congressional intent.[11] This is no

[11] In the case of *McDowell* v. *Duer*, 78 Ind. App. 440, 133 N. E. 839 (1922) (p. 840) the Court, in interpreting a Workmen's Compensation Statute, refused to recognize the doctrine of an independent contractor

longer a debatable point in law as it was conclusively and explicitly settled by this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (April 24, 1944) (*supra*). The *Hearst* case involved the question of whether newsboys are employees under the National Labor Relations Act, and in holding that they were, even though they might not be considered employees under the common-law, this Court stated:

> "The principal question is whether the newsboys are 'employees.' Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view 'common-law standards' are those the courts have applied in distinguishing between 'employees' and 'independent contractors' when working out various problems unrelated to the Wagner Act's purpose and provisions. . . .
>
> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . . (in) the statute where it appears,' United States *v.* American Trucking Association, 310 U. S. 534, 545, 84 L. Ed. 1345, 1352, 60 S. Ct. 1059, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co. *v.* Bassett, 309 U. S. 251, 259, 84 L. Ed. 732, 737, 60 S. Ct. 544; cf. New Negro Alliance *v.* Sanitary Grocery Co., 303 U. S. 552, 82 L. Ed. 1012, 58 S. Ct. 703; Milk Wagon Drivers'

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outside of the realm of tort, stating: "The doctrine of 'independent contractor' is peculiar to the law of negligence and we are not aware that it is appropriate to any other branch of the law. Certainly, it has no proper place in the law of Workmen's Compensation. We will eliminate that term, therefore, from further consideration."

Union v. Lake Valley Farm Products, 311 U. S. 91, 85 L. Ed. 63, 61 S. Ct. 122."

(See also *Willard* v. *Gentsch* (*supra*).)

In the case of *United States* v. *American Trucking Association*, 310 U. S. 534, 84 L. Ed. 1345 (*supra*), referred to in the *Hearst* decision, this Court in discussing judicial interpretation of the term 'employee' had stated:

> "The word (employee) is not a word of art. It takes color from its surroundings."

This statement is further elucidated in footnote 29 in that case by the following language:

> "That the word 'employee' is not treated by Congress as a word of art having a definite meaning is apparent from an examination of recent legislation. *Thus the Social Security Act specifically provides that 'The term "employee' includes an officer of a corporation.'"* Emphasis ours.)
>
> . . . . . .
>
> "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content."

This Court's decision in the *Hearst* case has been followed in recent appellate court decisions involving the question of liability for employer taxes under the Social Security Act. In *United States* v. *Vogue*, 145 F. (2d) 609 (*supra*) (decided November 13, 1944), Judge Parker speaking for the Fourth Circuit Court of Appeals stated:

> "Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the Fair Labor Standards Act, 29 U. S. C. A. Sec. 201 et seq., and the National Labor Relations Act,

29 U. S. C. A. Sec. 151 et seq., was enhanced pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. "Red caps" have been held employees of railroads within the Fair Labor Standards Act. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Southern Ry. Co.* v. *Black*, 4 Cir., 127 F. 2d 280. Needleworkers engaged in processing materials in their own homes on a piece work basis have been held within the act. *Walling* v. *American Needlecrafts*, 6 Cir., 139 F. 2d 60. And newsboys have been held employees within the meaning of the National Labor Relations Act. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851."

In the case of *Grace* v. *Magruder*, 148 F. (2d) 679 (supra), the United States Court of Appeals for the District of Columbia passed on this same question as it involved itinerant workers over whom the employer exercised little if any actual control and stated:

"The other alternative—upon which appellant relies—is that these persons are independent contractors. To support this interpretation, he cites the Gould case (Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211) for the proposition that taxing statutes should be strictly construed. *But these statutes are primarily remedial and require construction which will give effect to the intention of Congress, "in the light of the mischief to be corrected and the end to be attained," their taxing phase is secondary and incidental.*" (emphasis ours.)

In dealing with the Fair Labor Standards Act (52 Stat. 1060; 29 U.S.C.A. 201) the same rule of interpretation was applied in *Walling* v. *American Needlecrafts* (130 F. (2d) 63)

And the Committee on Ways and Means of the House of Representatives in reporting its proposed 1939 amendments to the Social Security Act, said:

> "A restrictive view of the employer-employee relationship should not be taken in the administration of the Federal old age and survivors insurance system, in making coverage determinations. *The tests for determining the relationship laid down in cases relating to tort liability and to the common law concept of master and servant should not be narrowly applied.* (Emphasis supplied.) (House Report No. 728, 76th Congress, First Session, page 76.)

The broad social objectives of the Social Security Act are shown by its executive and legislative history and are elucidated in *Helvering* v. *Davis*, 301 U. S. 169, 57 S. Ct. 904, 81 L. Ed. 1307 (1937) and *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937).

The objectives of the Act indicate that the term "employee" as used in the Act was intended to apply to that class of persons who promote in some way the business of others and whose economic welfare is, therefore, largely within the control of those for whom they render service.

Interveners come within that class. They do not operate businesses. They do not seek profits from the expenditure of money by the public. They seek only employment for wages in the same manner that the teller of a bank or the factory worker might seek employment, that is, to render services to another for the benefit and profit of the other and in return to be compensated for their work by the payment of wages or salaries or share of the profit from those for whom they work.

The services of musicians are personal. They are not engaged merely to provide musical entertainment for an employer totally disinterested in how such musical entertainment is performed or by whom such musical enter-

tainment is performed. Their employer wants them personally because he contemplates making a profit from their personal efforts. They cannot subcontract the work as an independent contractor can, for their employer is not interested only in the final accomplishment of the work but is interested in the way the work is performed every minute it is being performed as the profits their employer hopes to gain from their services are dependent upon the work of the musicians personally. When musicians render services in a restaurant, the owner profits from their services in the same way he profits from the services of the cooks and waiters, and when the musicians performed for petitioner, he sought to profit from their services in the same way.

While leaders might accept a portion of their compensation from the receipts of the employer, they always work for a basic wage, the scale for leaders as provided in the Constitution and By-laws of the American Federation of Musicians (R. 368). They cannot suffer a loss then on any employment, only the disappointment of not receiving as much as anticipated the same as any other employee might not get as much as anticipated from his employer under a bonus arrangement based upon the employer's profits.

Some orchestra leaders "obtain phenomenal success" (R. 657); however they are the exception to the rule. Where one might become famous, a hundred will remain unknown. The trials, tribulations and the needs of the hundred are obscured by the fame of the one. But the Social Security Act embraces them all. The one hundred thousand dollar a year president of a great corporation is within the orbit of the Social Security Act in the same manner as is the most menial clerk of that corporation who just could not make the grade. And there is no more reason for concluding that orchestra leaders are not within

that class of persons the Social Security Act intended to benefit because a few who are well known to the general public have no immediate need for benefits under the Act, than to conclude that all employees of corporations are not within the class of persons intended to be benefited by the Social Security Act because some employees of some corporations obviously are not in immediate need of benefits.[12]

Musicians, including leaders, become unemployed when no one desires their services, and they face loss of employment opportunities when they become older, in the same manner and to the same degree as any other category of workmen. In fact because of the personal nature of their work, employment opportunities for musicians become more scarce as they grow older to a greater degree than many other categories of workmen.

The Social Security Act clearly was intended to embrace workers of this sort, along with all other workers. Musicians, including leaders, are included within the broad social objective of the Social Security Act, and it was error for the District Court to narrowly interpret the Act to exclude them.

CONCLUSION

Only if interveners were prohibited by law from performing their services for petitioner as employees can the decision of the Circuit Court of Appeals be reversed and the District Court affirmed, because interveners clearly submitted themselves to the control of petitioner by the expressed provisions of their contract. To ignore that contract in determining the employment status of the parties

[12] While the Court below found each of the interveners to be leaders of "name bands" it will be observed that earnings were not high; for example, Tiny Hill received but $15.00 for an engagement (R. 99) and Buddy Fisher but $11.55 (R. 89).

would deny to them the right to perform services in the relationship they contracted.

The decision of the Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted,

JOSEPH A. PADWAY,
ROBERT A. WILSON,
736 Bowen Building,
Washington 5, D. C.;
CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa,
Attorneys for Interveners,
Respondents.

APPENDIX A

Statutes and Regulations

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

> "Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the fur-

nishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to con-

stitute employment within the meaning of the Act • • • ."

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

APPENDIX B

April 12, 1941.

Stevens Hotel Corporation, Michigan Boulevard at Balbo Drive, Chicago, Illinois.

Attention: Mr. J. A. Jones, Resident Manager

Sirs:

Reference is made to your letter dated March 19, 1941, in which you submit certain information requested by this office in connection with a determination of the status, for purposes of the taxes imposed by Subchapters A and C of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of Mr. Ray Heatherton and the musicians performing services under his direction at your establishment pursuant to a contract dated January 28, 1941.

You express the opinion in your letter that the legal relationship of employer and employee does not exist between the Stevens Hotel Corporation and Mr. Heatherton and the members of his orchestra. It is contended by you that Mr. Heatherton is an independent contractor, and your reasons for so believing are set forth.

Consideration has been given to the reasons set forth in your letter. However, it is noted that under the terms of the contract pursuant to which the orchestra is performing services, the Corporation engaged the personal services of eight musicians and a girl vocalist under the leadership of Mr. Heatherton. The contract specifies the place where the engagement

is to be performed, the dates of the engagement, and the lump-sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the Corporation shall have complete control of the services to be rendered thereunder. It is also provided that Mr. Heatherton as leader shall distribute the amount received from the Corporation to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of the orchestra, their social security account numbers, and their individual compensation. The contract is signed by a representative of the Corporation and by an employee of the Music Corporation of America, a booking agency, for Mr. Heatherton.

In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

Respectfully,

(Signed) GUY T. HELVERING,
Commissioner.

cc. Collector, Chicago, Illinois

INTERVENERS' APPENDIX C

FILED IN U. S. DISTRICT COURT DECEMBER 13, 1944

Treasury Department

Office of Commissioner of Internal Revenue

Washington 25, D. C.
November 2, 1944.

A&C:IT-Mimeograph
Coll. No. 5767
R.A. No. 1394

Status of Variety Entertainers for Federal Employment Tax Purposes and for Purposes of the Income Tax Withholding Under the Current Tax Payment Act of 1943.

Collectors of Internal Revenue, Internal Revenue Agents In Charge, and Others Concerned:

1. In A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944, it was stated that the Bureau was unable at that time, to rule conclusively on the status of certain variety entertainers. In general such variety entertainers are those who acquire and perform their own repertoires in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement. The Bureau further stated, however, that until a conclusive ruling is made, operators of theatres, night clubs, restaurants and similar establishments may consider such entertainers to be independent contractors.

2. Generally variety entertainers perform their special routines in a series of short-term engagements for a number of different operators of theatres, night clubs, restaurants, and similar establishments under contracts which ordinarily specify only the time, remuneration, place and duration of each engagement. The control, if any, which is exercised by such operators over the performance of their services is purely incidental to the continuity of the entertainment programs. Such entertainers will be considered to be inde-

pendent contractors for Federal employment tax purposes and for purposes of the income tax withholding under the Current Tax Payment Act of 1943.

3. Paragraph 2 is not applicable in the case of those performers in a "stage show", "floor show", etc., who are clearly in the operator's employ, e.g., an orchestra, glee club, and chorus line.

4. This mimeograph does not change the position of the Bureau with respect to musicians, entertainers, or actors who perform service pursuant to a "Form B" contract or other contract having substantially similar provisions as stated in Paragraph 2 of A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339. The rule stated in such paragraph of the mimeograph is equally applicable in the cases where leaders of orchestras pursuant to "Form B" contracts or other contracts having substantially similar terms undertake to furnish a "complete unit of entertainment" comprised of orchestra members and "acts" irrespective of whether remuneration is on the basis of a stated sum or on a percentage of the gross receipts. Variety entertainers performing services under such circumstances and conditions are excluded from the rule contained in Paragraph 2 hereof and are considered to be employees of the operator.

5. Inquiries relating to the income tax withholding should be addressed to this Bureau for the attention of IT:P:T. Inquiries relating to employment taxes should be addressed for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbol A&C:RR.

JOSEPH D. NUNAN, JR.,
Commissioner.

APPENDIX D

Rainbow Randevu Ballroom

October 18, 1944.

A&C:RR:3-SAH.

Collector of Internal Revenue, Post Office Box 1288, Salt Lake City 10, Utah.

Attention: Emt:FBM.

Reference is made to your letter dated October 9, 1944, and enclosures, relative to the Federal employment tax status of Mr. Les Brown and Mr. Jan Garber and the members of their orchestras with respect to services performed for Mr. Jerry Jones, doing business as the Rainbow Randevu Ballroom, Salt Lake City, Utah, pursuant to the terms of "Form B" contracts dated December 27, 1943, and July 21, 1943, respectively, copies of which were furnished.

Mr. Jones contends that the leaders and members of their orchestras mentioned above were not his employees irrespective of the form of contract under which they were engaged and refers to the ruling made in office letter dated November 20, 1942. Such ruling holds that Mr. Sonny Dunham and the members of his orchestra were not employees of Mr. Jones with respect to services performed by them pursuant to the terms of a contract dated August 14, 1940, on a contract form of the William Morris Agency, Inc.

The status of leaders and the members of their orchestras depends to a large extent on the terms of the contracts under which their services were performed. The contract under which Mr. Dunham and the members of his orchestra performed their services is similar in terms to that which was considered in Williams *v.* United States, 126 Fed. (2nd) 129 (C. C. A. 7; 1942). The Bureau has decided to follow the decision reached in that case in determining the status of orchestra members who perform services under

contracts and circumstances and conditions which do not differ in any material respect from the cited case.

The terms of the contract commonly referred to as Form B, the form of contract adopted by the American Federation of Musicians for use in connection with engagements of musicians on and after June 1, 1941, provide for the employment of a certain number of musicians, including the leader, designated as employees, to render personal services for the purchaser, the employer; that the employer shall, at all times, have complete control over the services which the employees will render under the specifications of the contract; and that on behalf of the employer the leader will distribute the amounts received from the employer to the employees, including the leaders.

The extended consideration which has been given to the terms of the "Form B" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchaser for Federal employment tax purposes. Your attention is invited to paragraph two of A&C:IT-Mimeograph Coll. No. 5638.

(Signed) VICTOR H. SELB
Acting Deputy Commissioner.

SUPREME COURT OF THE UNITED STATES

Nos. 731 AND 732.—OCTOBER TERM, 1946.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d. b. a. Crystal Ballroom, Petitioners,

731 v.

E. H. Birmingham, Individually and as Collector of Internal Revenue, for the State of Iowa, Griff Williams, et al.

Larry V. Geer and Margaret Geer, d. b. a. Larry Geer Ballrooms, Petitioners,

732 v.

E. H. Birmingham, Individually and as Collector of Internal Revenue for The State of Iowa.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 23, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

Petitioners, operators of public dance halls, brought these actions, which were consolidated for trial, against the respondent Collector of Internal Revenue to recover taxes paid under the Social Security Act, Titles VIII and IX, and I. R. C., c. 9, subchap. A and C. Recovery depends on whether petitioners' arrangements for bands to play at the dance halls made the band leaders and other members of the bands employees of the petitioners or whether, despite the arrangements, the leaders were independent contractors and therefore themselves the employers of the other members. Several band leaders were allowed to intervene in the *Bartels* case as defendants to protect their own interests. After a recovery in the District Court was reversed by the Circuit Court of Appeals, *Birmingham* v. *Bartels*, 157 F. 2d 295, they sought

certiorari which we granted because of the importance of the issue to the administration of the Act. — U. S. —. See Nos. 312 and 673, *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, decided June 16, 1947.

These cases are not concerned with musicians hired by petitioners to play regularly for their dance halls but with "name bands" hired to play for limited engagements at their establishments. These bands are built around a leader whose name, and distinctive style in the presentation and rendition of dance music, is intended to give each band a marked individuality. The leader contracts with different ballroom operators to play at their establishments for a contract price. Almost all of the engagements here involved were one-night stands, some few being for several successive nights. The trial court found, and there is no real dispute, that the leader exercises complete control over the orchestra. He fixes the salaries of the musicians, pays them, and tells them what and how to play. He provides the sheet music and arrangements, the public address system, and the uniforms. He employs and discharges the musicians, and he pays agents' commissions, transportation and other expenses out of the sum received from the dance hall operators. Any excess is his profit and any deficit his personal loss. The operators of the dance halls furnish the piano but not the other instruments.

The American Federation of Musicians, of which the leaders and the musicians are members, adopted a standard contract known as "Form B." The terms of this contract create the difficulties in the determination of this case. As compensation to the bands, some contracts call for a guaranteed sum, with the privilege to the bands to take a percentage of the gross. Other contracts are for a fixed sum, only, and others for a percentage of gross, not to exceed a fixed sum. The contract states that the ballroom operator is the employer of the musicians and their leader, and "shall have complete control of the serv-

ices which the employees will render under the specifications of this contract." The form paragraph, so far as pertinent, is set out in the margin.[1] The District Court found that the contract was adopted by the Union in order to shift the incidence of the social security taxes from the leader to the ballroom operator, and that it had no practical effect on the relations between the musicians, leader, and operator. The District Court held that the question of employment under the Act was one of fact, and that the contract was only one factor to be considered. Since the District Court believed that the contract was not entered into "by fair negotiation" and that its purpose was to protect the leaders from taxes as employers, it concluded that the contract was of no effect and that the leader was an independent contractor employing the musicians.

The Circuit Court of Appeals thought otherwise. It concluded that the test of employment was the common law test of control, *i. e.*, that one was an employer if he

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[1] "Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

. . . . . .

"The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. . . ."

had the "right" to direct what should be done and how it should be done. It concluded that the contract between the parties gave the ballroom operators the "right" to control the musicians and the leader, whether or not the control was actually exercised. While the majority thought that such a contract was not binding on the Government, they thought it was binding on the parties and would control liability for employment taxes if the Bureau of Internal Revenue chose to accept the arrangement as valid. *Birmingham* v. *Bartels*, *supra*, at 300.

The Government here relies entirely on the contract, conceding that otherwise the bandleaders are independent contractors employing the musicians. On the other hand, the bandleaders involved contend also that though the contract be thought inconclusive, the leaders and musicians are employees of the operators. They rely upon the dependence of the orchestra members upon the ballroom operators judged in the light of the purposes of the Act.

In *United States* v. *Silk*, No. 312, *supra*, we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk*, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the enter-

tainment field as we have just said, in *Silk*, that they were in that of distribution and transportation.

Consideration of the regulations of the Treasury and the Federal Security Agency, quoted in *Silk* at note 8, is necessary here. I. R. C., chap. 9, §§ 1429, 1609. Under those regulations, the Government successfully resisted the effort of a leader of a "name" band, like those here involved, to recover social security taxes paid on the wages of the members of his organization. *Williams* v. *United States*, 126 F. 2d 129. The contract in that case was not "Form B" and did not contain any corresponding control clause. Two years later, the Commissioner of Internal Revenue issued mimeographs 5638, 1944–5–11651, and 5767, 1944–22–11889, C. B. 1944, pp. 547–48. They were directed at the status of musicians and variety entertainers appearing in theatres, night clubs, restaurants and similar establishments. Collectors and others were therein advised that a "Form B" or similar contract with the entertainers made operators of amusement places liable as employers under the Social Security Act. In the absence of such a contract, that is, in reality, the absence of the control clause of "Form B," the entertainers, "with short-term engagements for a number of different operators" of amusement places, would be considered "independent contractors." The argument of respondents to support the administrative interpretation of the regulations is that the Government may accept the voluntary contractual arrangements of the amusement operators and entertainers to shift the tax burden from the band leaders to the operators.[2] Cases are cited to support this position.[3] All of these cases, however, involve the problem of cor-

[2] There is a contention that the contracts were coerced because the operators could not secure these musicians under other arrangements. We do not find it necessary to rely or pass upon that contention.

[3] *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *New Colonial Ice Co.* v.

porate or association entity. They are not pertinent upon the question of contracts to shift tax liability from one taxpayer to another wholly distinct and disconnected corporation or individual. We do not think that such a contractual shift authorizes the Commissioner to collect taxes from one not covered by the taxing statute. The interpretive rulings on the Regulations, referred to in this paragraph do not hav the force and effect of Treasury Decisions.[4] We are of the opinion that such administrative action goes beyond routine and exceeds the statutory power of the Commissioner. *Social Security Board v. Nierotko*, 327 U. S. 358, 369–70.

This brings us then to a determination of whether the members of a "name band" under the circumstances heretofore detailed are employees of the operator of the dance hall or of the leader. If the operator is the employer, the leader is also his employee.

We are of the opinion that the elements of employment mark the band leader as the employer in these cases. The leader organizes and trains the band. He selects the members. It is his musical skill and showmanship that determines the success or failure of the organization. The relations between him and the other members are permanent; those between the band and the operator are transient. Maintenance costs are a charge against the price received for the performance. He bears the loss or gains the profit after payment of the members' wages and the other band expenses.

The judgments of the Circuit Court of Appeals are reversed and those of the District Court are affirmed.

Helvering, 292 U. S. 435; *Helvering* v. *Coleman-Gilbert Associates*, 296 U. S. 369, 374; *Higgins* v. *Smith*, 308 U. S. 473, 477; *Gray* v. *Powell*, 314 U. S. 402; *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436, 439; *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590; *Schenley Corp.* v. *United States*, 326 U. S. 432, 437.

[4] See Cum. Bull. (1944), notice, p. 1.

SUPREME COURT OF THE UNITED STATES

Nos. 731 AND 732.—OCTOBER TERM, 1946.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d. b. a. Crystal Ballroom, Petitioners,

731 *v.*

E. H. Birmingham, Individually and as Collector of Internal Revenue, for the State of Iowa, Griff Williams, et al.

Larry V. Geer and Margaret Geer, d. b. a. Larry Geer Ballrooms, Petitioners,

732 *v.*

E. H. Birmingham, Individually and as Collector of Internal Revenue for The State of Iowa.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 23, 1947.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

As the opinion of the Court points out, the Form B contract involved in the present case was adopted, with the approval of the Commissioner of Internal Revenue, after it had been held under an earlier form of contract that members of the orchestra were employees of the band leader. On the face of the present contract the dance hall proprietor is the employer even under traditional concepts of master and servant. For he has all of the conventional earmarks of the entrepreneur—ownership, profit, loss, and control—if the provisions of the contract alone are considered. Then the requirements of the Social Security Acts are satisfied. And to hold the dance hall proprietor liable for the tax is not to contract the coverage contemplated by the statutory scheme.

I think the tax collector should be entitled to take such private arrangements at their face. In other situations a taxpayer may not escape the tax consequences of the business arrangements which he makes on the grounds that they are fictional. The Government may "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." *Higgins* v. *Smith*, 308 U. S. 473, 477. That rule is not restricted in its application to the use by taxpayers of corporate or related devices to obtain tax advantages. It was applied in *Gray* v. *Powell*, 314 U. S. 402, where a railroad sought exemption from the Bituminous Coal Act by contending that the operations of one who appeared to be an independent contractor were in fact its operations. The Court in rejecting the contention said that "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan." *Id.*, 414. I see no reason for creating an exception to that rule here. If the Government chooses to accept the contract on its face, the parties should be barred from showing that it conceals the real arrangement. Tax administration should not be so easily embarrassed.